(1)
Supreme Court, U.S.
FILED
99 1455 MAR 1 2000
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

GEORGE W. ATWELL,

Petitioner,

v.

DEBORAH D. ATWELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIRST DISTRICT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

GEORGE W. ATWELL
Petitioner, Pro Se
3801 St. Charles Avenue
Suite 400
New Orleans, LA 70115
(504) 269-0178

157937
Counsel Press LLC
(800) 274-3321 • (800) 359-6859

5409

QUESTIONS PRESENTED FOR REVIEW

1. When is a state not required to give full faith and credit to a judicial act or public record of a sister state.

2. Can the validity of a marriage be determined by the laws of a state other than the state in which the marriage had taken place.

3. Whether the *nunc pro tunc* provision of the California decree, and the application of that decree, violated the petitioner's right to due process guaranteed under the Fifth, Ninth and the Fourteenth Amendments of the United States Constitution.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Decision To Marry Is A Protected Right Under The Constitution.	5
II. The Appeals Court Misapplied The Full Faith And Credit Clause Of The Constitution.	7
III. The Appeals Court's Decision Violated The Petitioner's Constitutional Right To Due Process.	10
IV. The California *Nunc Pro Tunc* Decree Is Invalid Under California Law.	19

Contents

Page

V. The Children Of The Parties' Putative Marriage Are Legitimate. 20

VI. The Court Is The Final Arbiter Of Exceptions To The Full Faith And Credit Clause Of The Constitution. 23

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Alaska Packers Ass'n v. Industrial Acc. Com'n., 294 U.S. 532 (1935) 8, 9

Andrews v. Andrews, 188 U.S. 14 (1905) 7

Baker v. Baker, Eccles & Company, et al., 242 U.S. 394 (1917) 19

Beidler v. Beidler, 43 So.2d 329 (Fla. 1949) 11, 12

Dandy v. Dandy, 234 So.2d 728 (Fla. 1970) ... 11, 13, 23

Felhaber v. Felhaber, 669 F.2d 990 (11th Cir. 1982) 9, 10

Fiehe v. R. E. Householder Co., 98 Fla. 627, 125 So. 2 (1929) 17

Florida Development Co. v. Polk County Nat. Bank, 76 Fla. 629, 80 So. 560 (1919) 11, 17

Goldman v. Dithrich, 179 So. 715 (Fla. 1938) 10, 11

Graham v. Sulser, 58 Cal. 2d 899 (Cal. 1962) 19

Graves v. Carter, 207 Ga. 308, 61 S.E.2d 282 (1950) 15

Cited Authorities

	Page
Groover v. Groover, 383 So.2d 280 (Fla. 1980) ...	11
Grove v. Metropolitan Life, 271 F.2d 918 (1959) ..	22
Hansberry, et al. v. Lee, et al., 311 U.S. 32 (1940)	24
Holland v. Holland, 377 S.E. 2d 363 (1989)	22
In Re: Hughes Estate, 182 P.2d 253 (1947)	16
Jones v. Jones, 119 Fla. 824, 161 So. 836 (Fla. 1935)	10, 12
Karpuk v. Karpuk, 31 N.Y.S.2d 769 (1941)	15
Kuehmsted v. Turnwall, 103 Fla. 1180, 138 So. 775 (Fla. 1932)	11, 12, 15
Lee v. Hunt, 483 F. Supp. 826 (W.D. La. 1978) ...	22
Loughran v. Loughran, et al., 292 U.S. 216 (1934)	13
Magnolia Petroleum v. Hunt, 320 U.S. 430 (1943)	25
Matos v. Secretary of the Department of Health and Human Services, 35 F.3d 1549 (Fed. Cir. 1994)	18
Maynard v. Hill, 125 U.S. 190 (1888)	7, 8

Cited Authorities

	Page
Miller v. McKenna, 23 Cal. 2d 774 (Cal. 1994) ...	19
National Exchange Bank v. Wiley, 195 U.S. 257 (1904)	18
Norris v. Schotten, 146 F.3d 314 (6th Cir. 1998)	17
Parker v. Ellis, 362 U.S. 574 (1960)	17
Reese v. Reese, 192 So.2d 1 (Fla. 1966)	10, 11
Smith v. Organization of Foster Families, 431 U.S. 816 (1977)	5, 6
Williams v. North Carolina, 317 U.S. 287 (1942)	8, 10, 15, 25
Williams v. North Carolina, 325 U.S. 226 (1945) .	25
Zabloncki v. Redhail, 434 U.S. 374 (1978)	6
Statutes:	
28 U.S.C. § 1257	1
28 U.S.C. § 1738	1
California Family Code Section 2346(a)	16

Cited Authorities

Page

District of Columbia Code Section 16-907 22

District of Columbia Code Section 30-101 14

Florida Statute, Section 2.01 21

Florida Statute, Section 63.192 20

Florida Statute, Section 732.108 20

Florida Statute, Section 826.01 11

Florida Statute, Section 826.02 11

Florida Statute, Section 826.03 11

Virginia Statutes, Section 20-31.1 22

United States Constitution:

Article IV 15

Article IV, Section 1 ..... 1, 4, 5, 6

Fifth Amendment 2, 5, 6

Ninth Amendment ..... i, 2, 5, 6

Fourteenth Amendment ..... i, 1, 5, 6, 24

Cited Authorities

Page

Rule:

California Rule 1213 10

Other Authorities:

The Putative Marriage Doctrine. Tulane Law Review, Volume 60, Number 1, 60 Tul. L. Rev. 1 ..... 21, 22

Legal Education Main Handbook of the Florida Bar, 1998 Chapter 4, Section 4.5 23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The District Court Of Appeal For The First District, State Of Florida Dated And Filed April 30, 1999 ..... 1a

Appendix B — Final Judgment Of Annulment Of The Circuit Court Of The First Judicial Circuit In And For Escambia County, Florida Dated July 25, 1997 ..... 9a

Appendix C — Order Of The Supreme Court Of Florida Denying Petition For Review Dated December 3, 1999 ..... 18a

OPINIONS BELOW

The opinion of the District Court of Appeals for the First District, dated April 30, 1999, can be found at 730 So.2d 858 (Fla. App. Dist. 1 1999) (App. A). The opinion of the Circuit Court of the First Judicial Circuit, dated July 25, 1999, is unreported (App. B).

STATEMENT OF JURISDICTION

The Supreme Court of Florida declined to accept jurisdiction, and denied the Petition for Review on December 3, 1999 (App. C). This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV of the United States Constitution, Section 1.

> Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. Enacted by the Congress by 28 U.S.C. 1738.

The Fourteenth Amendment to the United States Constitution, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution. No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Ninth Amendment to the United States Constitution. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

The case presents a constitutional challenge to the decision of the Florida First District Court of Appeals in determining the petitioner's legal marital status by application of the Full Faith and Credit Clause of the Constitution to a California decree to which the petitioner could have been a party, but was barred by the respondent's fraud and deceit; application of California law to a Florida ceremonial marriage; and failure to apply Florida law to a Florida ceremonial marriage. Clarification by the Court of the Constitutional principles involved is required.

The parties to this petition met in January, 1978 in California where the respondent resided and the petitioner was temporarily assigned in the United States Navy. The respondent represented herself as divorced. The parties dated during the time when the petitioner was stationed in California, and visited during the time the petitioner was stationed in Pensacola, Florida. During one of those visits

to Pensacola in April, 1981, the petitioner unexpectedly proposed marriage, and the parties participated in a ceremonial marriage in Pensacola on April 9, 1981, after which the respondent returned to California.

Upon returning to California, and unknown to the petitioner, the respondent, having previously obtained only an interlocutory decree of divorce under which she could not legally remarry, moved the California court on April 27, 1981, to enter a final decree of divorce from her legal husband, *nunc pro tunc* to a date prior to the Florida ceremonial marriage, citing mistake and inadvertence and not realizing that she was not divorced, and the fact that she had remarried, and that the *nunc pro tunc* decree was necessary to validate the remarriage. On April 27, 1981, the California court granted a final decree of divorce *nunc pro tunc* to November 6, 1980, a date on which no hearing nor other judicial act took place. The order was entered on April 27, 1981.

Petitioner filed for divorce on December 8, 1995, in Escambia County, Florida Court. Upon learning in April, 1996, that the respondent was legally married to another man, and therefor had a living spouse on the date of the attempted Florida marriage, he moved the court to amend his pleadings, seeking an annulment of the void bigamous marriage, citing the respondent's fraud and deceit in obtaining his consent to the attempted marriage, the Florida statutes and case law, and the respondent's fraud and deceit in obtaining the California *nunc pro tunc* final decree of divorce. At trial, it was established by credible and substantial evidence; *i.e.*, court records from California, petitioner's affidavit, testimony, and the respondent's admissions, that the respondent had full knowledge that she was legally married

to another man when she attempted to enter into the Florida ceremonial marriage, and that the petitioner's consent was obtained by fraud. In granting the petitioner's motion for summary judgment, the trial court applied the laws of Florida, found the California *nunc pro tunc* divorce decree to be invalid, and issued a final order of annulment on July 25, 1997 declaring the parties' marriage bigamous and void *ab initio*.

On April 30, 1999, the Florida First District Court Of Appeals reversed the trial court's decision, not on any application of Florida Law or public policy, but solely on construction of the "full faith and credit clause", Article IV of the United States Constitution, and application of California Law, in effect giving face value to the California decree and ignoring the respondent's fraud and deceit in obtaining that decree and the petitioner's consent to the attempted Florida marriage. Essentially this amounted to an unreviewable decision. On December 3, 1999, the Florida Supreme Court declined to accept jurisdiction.

The federal questions were timely and properly raised at trial. Federal questions formed the sole basis of the appellate court's decision.

The petitioner asks the Court to review the case, and reverse the decision of the appeals court.

REASONS FOR GRANTING THE WRIT

For the reasons below, the petitioner asserts that the decision of the appeals court violated the principles of constitutional law embodied in Article IV of the Constitution as enacted by Congress, and the Fifth, Ninth and Fourteenth Amendments to the Constitution; directly conflicts with previous decisions of this Court; violated the petitioner's Constitutional rights under the Amendments above; and was fundamentally unjust.

There are few issues more central to the national interest and order of the Republic than family matters and interstate relations.

As to family matters, the Congress in Title 1, United States Code, Chapter 1, Section 7, defines "marriage" as a legal union between one man and one woman as husband and wife. The Constitution of the United States empowers each State to enact the laws which determine the legality of a marriage contracted in that State. Every federal bureau and agency under which the legality of a marriage is an issue; e.g., Social Security, Internal Revenue, Justice, Veterans', Railroad Retirement; relies upon those State laws in making their respective determinations as to the legal status of a citizen.

I. The decision to marry is a protected right under the Constitution.

The Supreme Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, *Smith v. Organization of Foster*

Families, 431 U.S. 816, 842-844 (1977). The decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships, *Zabloncki v. Redhail*, 434 U.S. 374, 386, 387 (1978). The expression of that freedom of personal choice and decision to marry, is an individual's giving of his/her free and voluntary consent to the marriage, and that expression of an individual's rights must be protected under the Fifth, Ninth, and Fourteenth Amendments of the Constitution as well.

In its most basic form, marriage is a personal relationship based on a voluntary civil contract between two parties who are capable of giving free consent. The parties must be legally competent to marry on the date of the marriage. The legal requirement for consent and capacity in marriage have not evolved, but rather have been unchanged throughout the history of western civilization, and have their roots in Jewish, Roman, and Cannon law. They were essential elements in English Common law, and remain the law in every civilized country and jurisdiction.

In the case at hand, the respondent, having a living spouse on the day of the attempted marriage, lacked the capacity to enter into a marriage contract. In addition, the consent of the petitioner was obtained by fraud and deceit. Lacking jurisdiction of a valid marriage, the trial court annulled the parties marriage. The respondent appealed. The appeals court reversed the trial court's decision, not on any application of Florida law, but solely on construction of the Full Faith and Credit Clause, Article IV of the Constitution. The only reference to Florida law was: "The trial court analyzed the issue of whether the marriage was valid by inappropriately applying Florida law without regard to the

action of the California court." If Florida law was inappropriate, then whose law was appropriate in this Florida action. The appeals court applied federal law and California law, in effect giving face value to the California *nunc pro tunc* decree, and ignoring Florida law and the respondent's fraud and deceit in obtaining both the decree and the petitioner's consent to the marriage. Without reference to, or construction of, Florida law, the appeals court's decision was effectively unreviewable.

The petitioner, in contracting the putative marriage in Florida, could not reasonably have anticipated that his actions would later be judged by application of California law, and a California court action of which he had no knowledge, and in which he had no voice. This is fundamentally unfair.

II. The appeals court misapplied the Full Faith and Credit Clause of the Constitution.

In *Andrews v. Andrews*, 188 U.S. 14 (1905), the Court stated "That marriage, viewed solely as a civil relation, possesses elements of contract is obvious. But it is also elementary that marriage, even considering it as only a civil contract, is so interwoven with the fabric of society that it cannot be entered into except as authorized by law . . ." Then quoting Mr. Justice Field, in *Maynard v. Hill*, (1888) 125 U.S. 190:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage

> . . . The consent of the parties is of course essential to its existence . . .

Id. at 205.

In *Williams v. North Carolina*, 317 U.S. 287 (1942), Mr. Justice Frankfurter stated: "The Constitution of the United States, however, reserves authority over marriage and divorce to each of the forty-eight states. That is our starting point."

> Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational [294 U.S. 532, 548] basis, that of the conflicting interests involved, those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home, although given no extra-territorial effect in the state of the other.

In *Alaska Packers Ass'n v. Industrial Acc. Com'n.*, 294 U.S. 532 (1935), the Court reasoned:

> A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that,

> wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. . . . it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another.

In that case the Court found that the interest of Alaska was not shown to be superior to that of California, where no persuasive reason was shown for denying to California the right to enforce its own laws in its own courts, and in the circumstance the full faith and credit clause did not require that the statutes of Alaska be given that effect. *Alaska Packers, supra.*

The appeals court in reversing the trial court's decision, cited *Felhaber v. Felhaber*, 669 F.2d 990, 994 (11th Cir. 1982):

> As noted by the 11th Circuit, Williams established "a two-stage analysis" for applying the Full Faith and Credit clause. First, the full faith and credit clause does not take effect if the original court lacked personal or subject matter jurisdiction. But a collateral examination of possible jurisdictional defects cannot be made, according to the federal principles of *res judicata*, if these issues were litigated or could have been litigated in the original proceeding. At the second stage of analysis, assuming the full faith and credit clause does come into play, a state court is required to give a prior sister state's judgement only "the same credit, validity, and effect . . . which it had in the state where it was pronounced."

At the first stage, it is clear that the California court had no jurisdiction of the petitioner, in that he was domiciled in Florida, and was not noticed. Had he not been kept in ignorance of the proceeding by the respondent's fraud and deceit, the petitioner, under Rule 1213 of the California Rules of the Court, could have become a party to the proceeding. Regarding collateral attack of a California judgment, the Eleventh Circuit found "In summary, we need not decide whether federal principles of *res judicata* bar an examination of the California court's jurisdiction, because California law allows such an examination." The trial court's invalidation of the California *nunc pro tunc* decree was fully in keeping with the judicial principles enumerated in both *Williams* and *Felhaber*.

At the second stage, the California decree is invalid under California law. (*See* Section IV below.)

III. The appeals court's decision violated the petitioner's Constitutional right to due process.

The California court, in deciding the validity of the Florida marriage, had neither subject matter jurisdiction of the Florida marriage, nor personal jurisdiction of the petitioner, a Florida resident.

Among other things, the Due Process Clause grants citizens the right to have their cases adjudicated based on the existing laws of their state.

The Florida First District Court of Appeals decision directly conflicts with the decisions of the Florida Supreme Court in *Goldman v. Dithrich*, 179 So. 715 (Fla. 1938); *Jones v. Jones*, 161 So. 836 (Fla. 1935); *Reese v. Reese*, 192 So.2d

1, 2 (Fla. 1966); *Beidler v. Beidler*, 43 So.2d 329 (Fla. 1949); and *Kuehmsted v. Turnwall*, 103 Fla. 1180, 138 So. 775 (Fla. 1932); and *Florida Development Co. v. Polk County Nat. Bank*, 76 Fla. 629, 80 So. 560 (1919). The public policy and laws of the State of Florida with respect to bigamous marriages are clear and unambiguous:

> The validity of a marriage is determined by the law of the state where the contract of marriage takes place.

Goldman v. Dithrich, 179 So. 715 (Fla. 1938).

Under Florida law, an individual is prohibited from marrying another while still legally married to a third person. Florida Statutes 826.01, 826.03.

If made, such a bigamous marriage is absolutely void; *Groover v. Groover*, 383 So.2d 280 (Fla. 1980), and a felony in the third degree. Florida Statutes 826.02.

If one of the parties to a marriage has a living, undivorced spouse by a prior marriage, a subsequent marriage is bigamous and void. *Reese v. Reese*, 192 So.2d 1 (Fla. 1966).

A bigamous marriage is void even if there had been an Interlocutory Judgment of Divorce of the previous marriage. *Dandy v. Dandy*, 234 So.2d 728 (Fla. 1970).

A bigamous marriage may, alternatively, be annulled on the basis of the married party's fraudulent misrepresentation of his or her capacity to marry. *Beidler v. Beidler*, 43 So.2d 329 (Fla. 1949).

> A person is guilty of fraud if he or she marries while still the lawful spouse of someone else. This fraud consists of the implied representation that the party was single when contracting the marriage. It continues as long as the party's silence on the matter of the previous marriage continues, and it affects all transactions that are based on the validity of the marriage . . . The married party cannot defend against a claim of fraud by asserting the belief that the earlier spouse had obtained a divorce. The spouse still married has the affirmative duty to advise the other party, before their marriage, about the earlier marriage and about the facts that lead him or her to conclude that a divorce exists.

Beidler, supra.

A void marriage is an absolute nullity, and no judgment or decree of nullity is necessary to restore the parties to their original rights. The issue of a void marriage may be raised in any court, between any parties, and either during the lifetime of the parties to the marriage or after their death. *Kuehmsted v. Turnwall*, 103 Fla. 1180, 138 So. 775 (Fla. 1932).

That the attempted Florida marriage on April 9, 1981 was bigamous and void on that date, and until April 27, 1981, the day of the *nunc pro tunc* decree, is clear. And a marriage once void is a nullity and incapable of being resurrected. The difference between a void and voidable marriage is whether it is possible for the parties to ratify it when the impediment to the validity of the marriage is removed. *Jones v. Jones*, 119 Fla. 824, 161 So. 836 (Fla. 1935). Bigamous

marriages remain void even if the parties cohabit after both became aware of the prior undissolved marriage, *Dandy, supra*, that is, the marriage cannot be ratified. A bigamous marriage is void at its inception.

The appeals court has decided an important federal question in a way that directly conflicts with the Court's decision in *Loughran v. Loughran, et al.*, 292 U.S. 216 (1934), in which a marriage, contracted in bad faith in Florida, was held to be invalid. The Court found that:

> Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction.
>
> The full faith and credit clause does not require the courts of a given jurisdiction to recognize a public act or record of another jurisdiction which is contrary to the public policy of the State of the forum.
>
> Congress in enacting the District of Columbia Code has put the marriage of persons whose previous marriage has not been terminated . . . by death or a decree of divorce in exactly the same classification as an incestuous marriage.
>
> A court of equity has the right to deny equitable relief to one who has deliberately created a situation contrary to the public policy of the lex fori.

> No principal seems to be better settled than that no court will lend its aid to one who founds his cause of action upon an illegal act . . . The status she created was prohibited by law.

The intent of Congress can be ascertained by review of the District of Columbia Code which it enacted:

> Section 30-101. Marriages void ab initio. The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely: . . . (3) The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or divorce.
>
> Section 30-103. Marriages void from the date of decree. The following marriages in said District shall be illegal, and shall be void from the time when their nullity shall be declared by decree, namely: . . . (2) Any marriage the consent to which of either party has been procured by force or fraud.

In the case at hand, application of the Full Faith and Credit Clause would deny the petitioner's rights guaranteed under the Due Process Clause of the Constitution in that it strips him of his right to freely consent to the marriage and to have the validity of his putative marriage determined by the laws of the forum, and thwarts the authorities and intents of both the Florida Legislature and United States Congress in creating the laws which regulate marriage. "The duty of a state to respect the judgements of a sister state arises only

where such judgements meet the tests of justice and fair dealing that are embodied in the historic phrase, 'due process of law.' " *Williams I, supra.*

Without regard to its contents, the California *nunc pro tunc* decree did not exist, in fact, until April 27, 1981. It was too late. Under Florida law the invalidity of the attempted marriage was adjudged April 9, 1981 and the matter, in reality, was *res judicata* (literal meaning). A void marriage is an absolute nullity, and no judgment or decree of nullity is necessary to restore the parties to their original rights. *Kuehmsted, supra.*

The California Court failed to give full faith and credit as required by Article IV of the Constitution to the already adjudged nullity of the Florida marriage under Florida law.

The appeals court decided an important question of federal law in a way that directly conflicts with the decision of the Supreme Court of Georgia in *Graves v. Carter*, 207 Ga. 308, 61 S.E.2d 282 (1950), in a case directly on point.

The Supreme Court of New York in *Karpuk v. Karpuk*, 31 N.Y.S.2d 769 (1941), regarding facts similar to this case found:

> the court cannot by a *nunc pro tunc* order for the entry of the judgement for divorce, give life to something that was dead at the time it was supposed to come into being. Under our statutes the divorce became complete three months after the entry of the interlocutory judgement. Such entry of judgement was therefore not a mere formality but rather a vital step in the proceedings for divorce, and until that step was taken . . . a

> marriage by either party to a third person was void ab initio and cannot be revitalized.

The trial court found the California *nunc pro tunc* decree invalid. The appeals court in its reversal of the trial court cited the California Family Code section 2346(a) (previously Section 133 of the Civil Code):

> If the court determines that a judgement of dissolution of the marriage should be granted, but by mistake, negligence, or inadvertence, the judgement has not been signed, filed, and entered, the court may cause the judgement to be signed, dated, filed, and entered in the proceeding as of the date when the judgement could have been signed, dated, filed, and entered originally.

The petitioner argues that "mistake, negligence, and inadvertence" apply not to a party to the divorce action, but to the judicial acts of the court. The appeals court construed the statute to mean otherwise, citing the decision of "One California court . . ." *In Re: Hughes Estate*, 182 P.2d 253, 256 (1947):

The respondent's fraud was not confined to concealing the California proceeding from the petitioner and obtaining his consent by deceit. At trial the respondent testified that she knew there was something non-final about her divorce, that something had to be filed, and a "fifty dollar filling fee or something" had to be paid in order for her divorce to be final. (T, July 8, 1997, Vol. I, p. 78) By admitting that she knew both at the time of the attempted marriage and entry of the of the final decree that she was not divorced, the respondent perpetrated a fraud upon the court.

Florida law with respect to orders *nunc pro tunc* is clear. Where there has been delay in entering a judgment, not caused by laches or negligence of the party entitled to judgment, but by error or misprision of the court or its clerk, an entry *nunc pro tunc* will be made; the interests of third parties not being affected, and justice requiring entry to be made. *Florida Development Co. v. Polk County Nat. Bank*, 76 Fla. 629, 80 So. 560 (1919). A *nunc pro tunc* cannot be resorted to for the purpose of validating a void proceeding, and only makes the decree valid as between parties, and is in force only from the time of actual entry. The essential elements of "due process" are notice and the opportunity to be heard and defend oneself in an orderly proceeding. *Fiehe v. R. E. Householder Co.*, 98 Fla. 627, 125 So. 2 (1929).

The decision of the appeals court conflicts with the decision of the Court in *Parker v. Ellis*, 362 U.S. 574 (1960):

> The rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgement or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable the laches of the parties, the judgement or decree may be entered retrospectively, as of a time when it should or might have been entered up.

The California statute conflicts with federal law with respect to orders *nunc pro tunc*. In *Norris v. Schotten*, 146 F.3d 314 (6th Cir. 1998), the United States Court of Appeals for the Sixth Circuit found "a *nunc pro tunc* order cannot be

used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide." In *Matos v. Secretary of the Department of Health and Human Services*, 35 F.3d 1549 (Fed. Cir. 1994), that court found:

> An order may be entered *nunc pro tunc* to make the record speak the truth but it cannot supply an order which in fact was not previously made. Failure to comply with statutory requirements is not curable *nunc pro tunc* . . . Petitioner is not seeking to use the state court's *nunc pro tunc* order to make the record reflect what was actually done. Rather he is relying upon the order to change the history of the case so that it states that something was not done was done. This is an impermissible use of a *nunc pro tunc* order.

The respondent signed her Request and Declaration for Final Judgment of Dissolution of Marriage from her husband on April 15, 1981, and requested the judgment be entered *nunc pro tunc* to November 6, 1980, to establish the validity of the Florida remarriage. It was filed with the California court on April 27, 1981, and judgment entered that same day. In that Declaration, the court was put on notice that there was now a third party, the petitioner, to the action before the court. A third party with a constitutional right to due process. Due process requires, at a minimum, notice and a meaningful opportunity to be heard. Neither was afforded the petitioner by the court. Such a practice violated the petitioner's right to due process. And in *National Exchange Bank v. Wiley*, 195 U.S. 257 (1904), the Court stated "A judgement obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in

another jurisdiction." The California court had no power to adjudicate the petitioner's right to an annulment in Florida. "The full faith and credit clause of the Constitution and the act of Congress passed pursuant to it do not entitle a judgement in personam to extra-territorial effect, if it be shown that it was rendered without jurisdiction over the person sought to be bound." *Baker v. Baker, Eccles & Company, et al.*, 242 U.S. 394 (1917).

IV. The California *nunc pro tunc* decree is invalid under California law.

The Supreme Court of California has clarified the limitations of legislative acts intending to give retroactive effect.

> The Legislature may not enact curative legislation the effect of which would be to destroy or to unlawfully infringe upon vested rights. In such cases laws confessedly retrospective have been declared ineffective when they were held to be in conflict with some right secured either by a constitutional guaranty or protected by the principles of universal justice.

Miller v. McKenna, 23 Cal. 2d 774 (Cal. 1994). Regarding the above California statute, the court in *Graham v. Sulser*, 58 Cal. 2d 899 (Cal. 1962) defined the nature of the vested rights which cannot be divested by the operation of the statute: "The term 'vested right' . . . is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner." The petitioner's Constitutional rights under due process above are indeed vested rights, the violation of which makes ineffective the California decree under California law.

V. The children of the parties' putative marriage are legitimate.

The opinion of the appeals court contains an assertion of fact that the petitioner's children were or would be bastardized by an annulment of the putative marriage of the parties. It must be addressed. The children are, and always have been, legitimate. The rationale for this view is as follows:

Under the common law, legitimacy concerned only three issues: title, support, and inheritance. Here the children bear the name of their father as attested to by birth and baptismal certificates, have enjoyed, and continue to enjoy, the love and support of their father, and have had their inheritance rights assured by the father's actions in executing a will naming them as his heirs immediately after the decree of annulment to preclude any possible future attack upon their right to inherit in accordance with Florida Statute 732.108, which grants full inheritance rights, and declares the children lineal descendants and natural kindred of both father and mother when the parents have participated in a ceremonial marriage, even though the attempted marriage is void. The statute in effect legitimizes the children.

Florida law is clear in the case of the petitioner's adopted daughter: Florida Statutes 63.192:

> A judgement of court terminating the relationship of parent and child or establishing the relationship by adoption issued pursuant to due process of law by a court of any other jurisdiction within or without the United States shall be recognized in this state, and the rights and obligations of the

> parties on matters within the jurisdiction of this state shall be determined as though the judgement were issued by a court of this state.

Additionally, there has never been a motion or cause of action before the court seeking to overcome the strong presumption of legitimacy which is the public policy of Florida, and absent such cause of action no court should as much as address the issue. Given the above, there would be no legal consequence in any case, other than to affix a prejudicial label. The appeals court had simply no compelling interest in addressing the issue.

Florida is a common law state. Section 2.01 of the Florida Statutes declares

> The common and statute laws of England which are of general and not a local nature . . . down to the 4th day of July, 1776, are declared to be in force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Under the putative marriage doctrine, a putative marriage is a marriage which is in reality null, but which allows the civil effects of a valid marriage to flow to the party who contracted it in good faith, when there has been a ceremonial marriage which was void or voidable due to some legal impediment. If at the time of the children's conception, one of the parents had a good faith belief that there was no impediment to the marriage, then the children are considered legitimate. The doctrine was part of the English common law as it existed at the time of the Declaration of Independence, 60 Tul. L. Rev.

1, *6, 7, 8. The doctrine should be law in Florida for the reasons above. Indeed it is the law of the land in the petitioner's home state of Louisiana, *Lee v. Hunt*, 483 F. Supp. 826 (W.D. La. 1978), and most jurisdictions have implemented it some form:

The District of Columbia:

The laws of the District of Columbia which define the parent and child relationship: "The term 'legitimate' or 'legitimized' means that the parent child relationship exists for all rights, privileges, duties, and obligations under the laws of the District of Columbia." Section 16-907, D.C. Code (1981). "This relationship is not dependent on marriage. A child born in wedlock or out of wedlock is the legitimate child of its father and mother and is the legitimate relative of it's father's and mother's relatives by blood or adoption." The intent of the United States Congress in enacting those laws is clear.

The Commonwealth of Virginia:

From 1986 to 1988, the parties and their three children resided in Virginia pursuant to official Navy orders, and were subject to the laws of Virginia. The Virginia Statutes, Section 20-31.1, states simply: "The issue of marriages prohibited by law, deemed null or void or dissolved by a court shall nevertheless be legitimate." By ratification the children must be legitimate.

That law has been consistently upheld in the courts, and in both the Virginia Supreme Court, *Holland v. Holland*, 377 S.E.2d 363 (1989), and the United States Court of Appeals for the Fourth Circuit, *Grove v. Metropolitan Life*, 271 F.2d 918 (1959).

The Continuing Legal Education Main Handbook of the Florida Bar, 1998, Chapter 4, Section 4.5 states: "The policy of the law requires that every reasonable presumption be made in favor of legitimacy, and places the burden of proof on the person alleging illegitimacy." In this case, both the petitioner and respondent declared in open court that the children were their natural offspring and there has been no legal action by either party seeking to overcome the presumption. The children are legitimate.

VI. The Court is the final arbiter of exceptions to the Full Faith and Credit Clause of the Constitution.

The respondent's affirmations and the California *nunc pro tunc* decree may have raised a reasonable doubt to preclude her conviction for the crime of bigamy, but the final hearing was a civil trial in which the judge took testimony, saw the evidence, evaluated the veracity of the witnesses, and tilted the scales of justice accordingly. That is the due process commanded by the Constitution. The appeals court made no effort to weigh the interests of Florida and its public policy and laws, the decision of the trial judge, and the testimony and evidence presented by the petitioner, which must be construed in the light most favorable to him as the prevailing party at trial, *Dandy, supra*, against the interests of California. To the contrary, the appeals court found the trial court in error for even considering the laws of Florida:

> This matter is very simple when considered in light of the official records of California and Florida, which show that Deborah Atwell was married to Mr. Favara in 1974, was divorced from him in 1980, and was married to George Atwell in 1981. The trial court should have looked no further than that.

Such reasoning violates the basic Constitutional requirement for due process, and the inherent constitutional rights of the petitioner. It precludes from appellate consideration the petitioner's ability to present his case under the laws of the forum state, which is a requirement of the Fourteenth Amendment of the Constitution. It precludes the trial court from deciding a case based upon the laws of the forum state. It precludes fundamental fairness and justice.

The appeals court decision directly conflicts with the Court's decision in *Hansberry, et al. v. Lee, et al.*, 311 U.S. 32 (1940), regarding fraudulent proceedings and application of the Full Faith and Credit Clause: "Such fraudulent proceedings cannot be *res judicata* against anyone." In that case the Court found that in balancing the equities, the court must have considered the petitioners' own misconduct estopped them from attacking the respondents' plea of *res judicata*. The Court stated:

> But when the judgement of a state court, ascribing to the judgement of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have been adjudged has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.
>
> Judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

In *Magnolia Petroleum v. Hunt*, 320 U.S. 430 (1943), and *Williams v. North Carolina*, 317 U.S. 287 (1942), the Court established itself as the final arbiter of the extent of exceptions to, and limitation on, the application of the Full Faith and Credit Clause. In *Williams v. North Carolina*, 325 U.S. 226 (1945), regarding the Due Process Clause and the Full Faith and Credit Clause, the Court stated ". . . since it is a federal question, each new litigant has a statutory right to ask us to pass on it."

CONCLUSION

The petitioner respectfully requests the Court to review this case, and to restore to him the rights denied him by the appeals court, but guaranteed him under the Constitution. The decision of the appeals court should be reversed.

Respectfully submitted,

GEORGE W. ATWELL
Petitioner, Pro Se
3801 St. Charles Avenue
Suite 400
New Orleans, LA 70115
(504) 269-0178

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT, STATE OF FLORIDA DATED AND FILED APRIL 30, 1999

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

* * *

CASE NO. 98-600/1888/2507

DEBORAH ATWELL,

Appellant/Cross-Appellee,

v.

GEORGE W. ATWELL,

Appellee/Cross-Appellant.

Opinion filed April 30, 1999.

An appeal from the Circuit Court for Escambia County. Michael Jones, Judge.

* * *

PER CURIAM.

Deborah Atwell challenges a judgment that annulled her marriage to George Atwell, who cross-appeals orders on child support and attorney's fees. We reverse the annulment and, for reasons set out below, we do not address the cross-appeal.

Appendix A

The facts are these: Deborah Atwell was married in California in 1974 to Thomas Gary Favara. In 1978, she commenced divorce proceedings against Mr. Favara in California, and, pursuant to stipulation, received an interlocutory judgment of dissolution of marriage on August 6, 1980. This judgment was not final and would not become final until one of the parties made a proper motion. Neither party took any action at that time.

Deborah Favara and George Atwell had been dating during the pendency of her divorce proceedings, and were married in Pensacola, his home town, on April 9, 1981. Shortly after their wedding, they returned to California, where George Atwell, then a U.S. Navy physician, was stationed.

Almost immediately upon her return to California, Mrs. Atwell became involved in a legal dispute with Mr. Favara and his girlfriend, and hired legal counsel. Her lawyer discovered that the interlocutory dissolution had never been made final, and moved the California court to enter the final dissolution of the Favara marriage nunc pro tunc, pursuant to a California statute.[1] The California court entered an order

---

1. The entry of nunc pro tunc orders of divorce apparently is a longstanding practice in California. Presently, it is expressed in California Family Code section 2346(a), which states in pertinent part:

> If the court determines that a judgment of dissolution of the marriage should be granted, but by mistake, negligence, or inadvertence, the judgment has

(Cont'd)

April 28, 1981, but made it nunc pro tunc to November 6, 1980.

For 14 years, Dr. and Mrs. Atwell lived together, purchased and owned property by the entireties and filed joint income tax returns. Dr. Atwell adopted Mrs. Atwell's child from her marriage to Mr. Favara, and the couple had two other children. In 1995 Dr. Atwell instituted dissolution of marriage proceedings, and approximately one year later filed a petition for annulment, contending that Deborah Atwell was not yet divorced at the time she married him, so they were never legally married.

The trial court ultimately agreed with Dr. Atwell and granted the annulment.[2] The court ruled that, while the parties

---

(Cont'd)

> not been signed, filed, and entered, the court may cause the judgment to be signed, dated, filed, and entered in the proceeding as of the date when the judgment could have been signed, dated, filed, and entered originally . . . .

Subsection (d) provides, in pertinent part: "Upon the entry of the judgment, the parties have the same rights with regard to the dissolution of marriage becoming final on the date that it would have become final had the judgment been entered upon the date when it could have been originally entered."

2. The court below employed a curious procedure wherein it granted Dr. Atwell's motion for summary judgment on the petition for annulment, and then held an evidentiary hearing to consider Mrs. Atwell's defenses. It entered a Final Judgment of Annulment after this hearing.

believed that they were entering into a valid marriage in Florida, their marriage was void because Mrs. Atwell had not yet moved the California court to make final her dissolution from Mr. Favara.

After granting the judgment annulling the marriage, the trial court took up the issues of child support and alimony. The parties had previously entered into a mediated agreement that called for Dr. Atwell to pay $2,100 per month in child support and $4,300 monthly in alimony should the trial court not grant the annulment. In the event of an annulment, only the property division and child support would be binding.

The trial court ruled it was "precluded" from awarding alimony to Mrs. Atwell because of the mediated agreement and also because she was not entitled to alimony, as she was still married in California at the time she was married in Florida and could "not be designated an innocent party." The trial court did, however, increase the child support from $2,100 monthly, ultimately setting it at $3,177.38 monthly (the recalculation was due, in part, to the fact that Mrs. Atwell would not be receiving alimony).

The court also awarded Mrs. Atwell attorney's fees for an appeal, ordering $9,000 to be paid to Mrs. Atwell's attorney.

Mrs. Atwell challenges the annulment, arguing that the trial court erred in not granting full faith and credit to the California nunc pro tunc judgment and pointing to the negative consequences of annulling a 16-year marriage, which include the fact that it illegitimizes the two children

born of their marriage, casts doubt on the validity of the adoption (which was premised on Dr. Atwell being married to the child's mother), and could have serious tax and military benefit ramifications. Dr. Atwell cross-appeals the orders setting child support and awarding attorney's fees. Because we agree with Mrs. Atwell that the trial court erred in not giving full faith and credit to the California judgment of dissolution of marriage, and therefore erred in granting the annulment, we decline to address the cross-appeal.

The trial court analyzed the issue of whether the marriage was valid by inappropriately applying Florida law without regard to the action of the California court. It reasoned that Mrs. Atwell would not have been considered divorced under Florida law, and was therefore legally incapable of entering into a valid marriage at the time.

By concluding that Mrs. Atwell could not have received a nunc pro tunc divorce under Florida law, the trial court overlooked the main point, which is that in fact and by law California had declared Mrs. Atwell's first marriage dissolved as of November 6, 1980. Under the United States Constitution, state courts are bound to give full faith and credit to valid judgments rendered in other states, irrespective of whether the law of the forum state would have permitted the same result.

The Constitution states the proposition quite succinctly: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. To give full faith and credit to a foreign judgment is to give it the same effect that the

foreign state would have given it. *See Williams v. North Carolina*, 325 U.S. 226 (1945). As noted by the 11th Circuit, *Williams* established "a two-stage analysis" for applying the Full Faith and Credit clause. *Fehlhaber v. Fehlhaber*, 669 F.2d 990, 994 (11th Cir. 1982).

> First, the full faith and credit clause does not take effect if the original court lacked personal or subject matter jurisdiction. But a collateral examination of possible jurisdictional defects cannot be made, according to federal principles of res judicata, if these issues were litigated or could have been litigated in the original proceeding. At the second stage of analysis, assuming the full faith and credit clause does come into play, a state court is required to give a prior sister state court's judgment only "the same credit, validity, and effect . . . which it had in the state where it was pronounced."

Id. at 994 (citations omitted).

Under that analysis, it is clear that full faith and credit should have been given the California judgment and official records, which show that the marriage of Deborah and Thomas Gary Favara was dissolved as of November 6, 1980, some five months prior to the Atwells' marriage in Florida. California had jurisdiction over the subject matter and over the parties (it is undisputed that the Favaras were domiciled there) and California courts would recognize the Favara divorce as being effective on November 6, 1980. Therefore, the courts of this state and all others must recognize that as

the official date. *See, e.g. Estate of Storer*, 544 P.2d 95 (1975) (giving full faith and credit to California judgment of divorce granted nunc pro tunc).

Moreover, it appears that Mrs. Atwell's situation was precisely that which the California law was intended to address. One California court expressed the rationale of permitting nunc pro tunc divorces as follows:

> The purpose was to validate otherwise void marriages and thus relieve the parties to such marriages from the stigma and other consequences of bigamous relationships into which they might innocently fall by reason of oversight or neglect to have a final decree entered. Mere entry of the nunc pro tunc judgment acts retroactively to restore them to the status of single persons and at the same time gives them and their later acquired spouses legal married status. It is all strictly artificial, but so is the semidivorced status occupied by the holders of an interlocutory decree.

In Re Hughes' Estate, 182 P.2d 253, 256 (1947).

This matter is very simple when considered in light of the official records of California and Florida, which show that Deborah Atwell was married to Mr. Favara in 1974, was divorced from him in 1980, and was married to George Atwell in 1981. The trial court should have looked no further than that.

Appendix A

It is axiomatic that a valid dissolution of marriage, granted by a court of competent jurisdiction, removes legal incapacity to marry. The marriage of Deborah and George Atwell thus was valid as a matter of law, and this cause must be remanded for the trial court to take up the dissolution action.

Upon remand, the trial court will have to readdress the questions of alimony and child support. The rationale for denying alimony was that the parties had never been validly married. Obviously, our holding that their marriage was valid has the effect of vitiating that rationale. Moreover, if Mrs. Atwell is to receive alimony, her income may be substantially changed and the calculations regarding child support may need to be readdressed. Thus, we leave it to the trial court to determine the effect of the parties' mediated settlement agreement.

As to the cross-appeal on attorney's fees, we note that Dr. Atwell's argument is premised on the now unsupportable position that fees were inappropriate because the marriage was not valid. Moreover, we note that such an order is permitted under section 61.16, Florida Statutes. However, in light of the fact that our decision may change the parties' financial status, and not wishing to intrude on the discretion of the trial court, we decline to reach this issue, as well.

The judgment below is reversed and the matter is remanded for proceedings consistent with this opinion.

JOANOS, MINER and DAVIS, JJ., CONCUR.

APPENDIX B — FINAL JUDGMENT OF ANNULMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA DATED JULY 25, 1997

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

Case No.: 95-3483C
Division M

IN RE: The Marriage of

GEORGE W. ATWELL,

Petitioner/Husband,

and

DEBORAH D. ATWELL,

Respondent/Wife.

FINAL JUDGMENT OF ANNULMENT

THIS CAUSE is before the Court on the Petitioner's Petition for Annulment and Motion for Summary Judgment and Respondent's responses thereto. The Court granted Petitioner's Motion for Summary Judgment only to the extent that the Court determined the parties' marriage was void because Respondent's prior marriage was not yet dissolved when the parties participated in their marriage ceremony. The Court then received evidence relating to Respondent's

affirmative defenses. As explained below, the Court enters final judgment for Petitioner.

I

At the July 8, 1997 hearing the Court granted summary judgment as to Petitioner's claim that the parties' marriage was void. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Rule 1.510, Fla.R.Civ.P.; *Brock v. Associates Finance, Inc.*, 625 So.2d 135 (Fla. 1st DCA 1993). An issue of fact is "genuine" if the record as a whole could lead a rational trier of fact to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).[1] A "material fact" is one that is relevant to the issues raised in the pleadings. *Holl v. Tolcott*, 191 So.2d 40 (Fla. 1966). The Court must take the evidence and draw all reasonable inferences therefrom in a light most favorable to Respondent. *Harvey Building, Inc. v. Haley*, 175 So.2d 780 (Fla. 1965).

On July 8, 1997, the Court conducted a hearing on Petitioner's Motion for Summary Judgment. Petitioner and Respondent were present with respective counsel. The undisputed material facts presented follow:

---

1. The Florida and federal rules relating to summary judgment are virtually identical.

Appendix B

Respondent was married in California to Thomas Gary Favara on April 20, 1974.

Respondent and Mr. Favara received an Interlocutory Judgment of Dissolution of Marriage from the California court on August 6, 1980 that prominently displayed the following language: "The interlocutory judgment to which this notice refers does not constitute a final dissolution of marriage and the parties are still married. . . . Neither party may remarry until a final judgment of dissolution is entered."

Petitioner and Respondent participated in what they believed to be a valid marriage ceremony in Florida on April 9, 1981.

Following the April 9, 1981 ceremony, the parties learned that Respondent's divorce from Mr. Favara in California was not final.

Respondent filed her Request for Final Judgment in California on April 27, 1981. The California court entered a Final Judgment of Dissolution *nunc pro tunc* to November 6, 1980 in conformity with California law?[2]

---

2. Section 2346, California Family Code states in pertinent part: "If the court determines that a judgment of dissolution of the marriage should be granted, but by mistake, negligence, or inadvertence, the judgment has not been signed, filed, and entered, . . . the court may cause the judgment to be entered nunc pro tunc. . ." (Cont'd)

Appendix B

The parties did not participate in any subsequent marriage ceremony in Florida following the California final divorce decree.

Petitioner filed his Petition for Annulment on December 13, 1995.

II

The Court concluded the parties' 1981 marriage in Florida was invalid pursuant to Florida law. The law is well settled that when one of the parties has a living, undivorced spouse by a prior marriage, a subsequent marriage is bigamous and void. *Reese v. Reese*, 192 So.2d 1 (Fla. 1966). A bigamous marriage is void even if there had been an interlocutory judgment of divorce of the previous marriage. *Dandy v. Dandy*, 234 So.2d 728 (Fla. 1st DCA 1970). A void marriage is an absolute nullity. *Kuehmsted v. Turnwall*, 103 Fla. 1180, 138 So. 775 (1932).

According to the undisputed facts, Respondent was still married to Mr. Favara when she married Petitioner in Florida

---

(Cont'd)
While the California courts permit the provision to validate a subsequent remarriage of one spouse occurring between the time of the interlocutory decree and the *nunc pro tunc* final judgment of dissolution of marriage, *In re Estate of Hughes*, 182 P.2d 253 (Cal. Dis. Ct. App. 1947), Florida has no similar statute. Florida courts consistently hold that the intervening marriage is void, not voidable, and, consequently, an absolute nullity. Thus, this Court cannot construe the California statute to resuscitate the parties' invalid marriage.

in 1981 and had merely an interlocutory order anticipating divorce. Under Florida law at the time of the 1981 ceremony, Respondent was not legally capable of entering into a marriage contract with Petitioner. *In re Suggs Estate*, 405 So.2d 1360 (Fla. 5th DCA 1981). Florida case law dictates that Respondent's subsequent marriage to Petitioner was bigamous and, therefore, void.

Unlike voidable marriages, a void marriage is an absolute nullity and cannot be subsequently ratified by contracting parties.

> Under ordinary circumstances, the effect of a void marriage so far as concerns the conferring of legal rights upon the parties, is as though *no marriage had ever taken place*, and therefore being good for no legal purpose, its invalidity can be maintained in any proceeding in which the fact of marriage may be material, and upon mere proof of the facts rendering such marriage void, it will be disregarded or treated as *nonexistent* by the court.

Kuehmsted, 138 So. at 777 (emphasis added).

III

Respondent argued at the hearing that, even if the Court finds the parties' marriage is void, the equitable doctrine of estoppel can be applied to prevent Petitioner from attacking the validity of the foreign divorce decree to achieve an equitable outcome. The Court invited the parties to present evidence as to this matter.

Appendix B

The evidence of inequity is based on the premise that Petitioner benefitted from the faulty California divorce decree when he married Respondent. The parties and witnesses testified that the parties were married for sixteen years during which Petitioner adopted Respondent's daughter and the parties had children of their own. In sum, both parties acted in reliance on the validity of the Florida marriage.

Florida courts hold that the doctrine of estoppel may be used as an affirmative defense to a party's challenge to the validity of a previous divorce decree if, under the circumstances, that attack would be inequitable. *Keller v. Keller*, 521 So.2d 272 (Fla. 5th DCA 1988) (relying on Restatement (Second) of Conflict of Laws § 74 (1971)).

The Restatement explains that "inequity exists when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the *earlier conduct of the attacking party*." Restatement (Second) of Conflict of Laws § 74, cmt. (1971 & Supp. 1996) (emphasis added). The case law is also clear that a party cannot attack the validity of a prior decree to support a contention that a subsequent marriage is void when *that* party played a role in obtaining the prior decree. In *Keller*, the appellant sought review of a final dissolution of marriage that awarded appellee alimony. Appellant argued that the marriage was void *ab initio* because the divorce he obtained from his prior marriage was invalid. The court found the appellant could not question the validity of the prior divorce decree "because *he not only sought and procured it*, but took advantage of it by remarrying." *Id.* at 275 (emphasis added). Moreover, the court found the appellee acted in good

faith and did not take any part in the procurement of the prior divorce.

This reasoning is evident in *Lambert v. Lambert*, 534 So.2d 686 (Fla. 4th DCA 1988) as the court found a former husband was estopped from challenging the validity of a prior divorce decree when he initiated and obtained that decree. In *Arnold v. Arnold*, 500 So.2d 739 (Fla. 3d DCA 1987) the court affirmed a trial court's equitable power to reject an ex-husband's offer of proof of an invalid prior decree because that decree "was originally made through the fault, connivance or fraud of the . . . complaining party." *Id.* at 740.

This Court distinguishes the instant case from the forementioned cases in that, according to the undisputed facts, Petitioner, the party challenging the prior California divorce decree, did not procure or contribute to the error of the invalid decree. Moreover, although the parties were dating at the time, Petitioner was not an active participant in the California divorce proceedings. Finally, Respondent testified that neither she nor Petitioner were aware that her divorce from Mr. Favara was not final when they married in 1981, and when filling out the marriage certificate in Florida with Petitioner, Respondent indicated that her prior marriage was final in California in August 1980.

The Court found that Petitioner successfully demonstrated the nonexistence of any genuine issue of material fact and that pursuant to Florida law, the parties April 1981 marriage in Florida is void. The Court further finds that Respondent has failed to demonstrate that

Petitioner acted in bad faith when he married Respondent in Florida in 1981 or that he had a role in procuring the invalid California decree. Consequently, the Court finds Respondent fails to demonstrate the elements necessary to assert the doctrine of estoppel as an affirmative defense to the void marriage.

IV

Respondent asserts a second affirmative defense of laches. The Court determines that Petitioner was aware of the invalidity of the California divorce soon after he married Petitioner, and that even with this knowledge for over 14 years, he held himself out as Petitioner's husband, entered into contracts and acquired assets with Respondent as "Husband and Wife", adopted Petitioner's daughter and fathered two children with Petitioner. The law, however, is clear that a bigamous marriage is void and remains void even if the parties cohabit after both become aware of the prior undissolved marriage. *Dandy v. Dandy*, 234 So.2d 730 (Fla. 1st DCA 1970); *but see Jones v. Jones*, 119 Florida 824, 161 So. 836 (1935); *Day v. Day*, 331 So.2d 335 (Fla. 1st DCA 1976) (holding that a marriage which is void because of an existing undissolved marriage which is unknown to one of them, absent fraud or deception by the other, ripens into a voidable common law marriage prior to 1968). Furthermore, the laches defense is not available in an action challenging a void marriage. As stated by the court in *Kuehmsted*, a challenge to the validity of a *void* marriage "can be maintained in any proceeding in which the fact of marriage may be material, either direct or collateral in any civil court between any parties *at any time*" *Kuehmsted*, 138 So. at 777 (emphasis added).

Appendix B

V

The parties engaged in and completed a mediated settlement as to issues relating to child custody, child visitation and child support. The Court reserves judgment to enter an order in accordance with the parties' settlement agreement.

VI

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the Petition for Annulment is **GRANTED**; and the marriage between Petitioner, George W. Atwell, and Respondent, Deborah D. Atwell, which occurred on April 9, 1981 in Escambia County, Florida, is hereby declared void, an absolute nullity, and of no effect.

DONE and **ORDERED** in Chambers at Pensacola, Escambia County, Florida this 25th day of July, 1997.

s/ Michael Jones
MICHAEL JONES
CIRCUIT JUDGE

APPENDIX C — ORDER OF THE SUPREME COURT OF FLORIDA DENYING PETITION FOR REVIEW DATED DECEMBER 3, 1999

SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 3, 1999

CASE NO. 95,694

District Court of Appeal,
1st District — No. 98-600
98-1888
98-2507

GEORGE W. ATWELL,

Petitioner,

vs.

DEBORAH ATWELL,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

BH